MAR 4 1974

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-5661

FRANCIS A. ADAMS, ROBERT J. STENEMAN; and MICHAEL W. YOUNGQUIST,

Petitioners,

v.

THE SECRETARY OF THE NAVY and COMMANDANT OF THE MARINE CORPS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' BRIEF

WILLIAM A. DOUGHERTY
PAUL R. CONSTANTINO
17291 Irvine Boulevard
Tustin, California 92680
Telephone: (714) 838-7222

Counsel for Petitioners

Washington, D.C. • CLB PUBLISHERS • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-5661

FRANCIS A. ADAMS, ROBERT J. STENEMAN; and MICHAEL W. YOUNGQUIST,

Petitioners,

v.

THE SECRETARY OF THE NAVY and COMMANDANT OF THE MARINE CORPS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONERS' BRIEF

ISSUE PRESENTED

Whether a member of an armed services reserve component who serves in excess of four years and six months but less than five years of continuous active duty prior to his involuntary release from said active duty is entitled to readjustment payment under Title 10 United States Code §687(a).

Stated in another manner, the sole issue posed by these consolidated cases is whether the definition of a "year" which is contained in 10 U.S.C. §687(a)(2) is to be

applied when computing "eligibility" for readjustment pay as well as when computing the "quantum" of readjustment pay for those servicemen eligible. Accordingly, the function of the so-called "rounding provision" found in 10 U.S.C. §687(a)(2), when viewed in the larger context of subsection 887(a) is central to this Court's inquiry.

STATEMENT OF THE CASE

The petitioners, three Marine Corps Reserve officers, then serving on active duty as Naval Aviators with the United States Marine Corps, brought actions in the district court seeking an order requiring the defendants, The Secretary of the Navy and The Commandant of the Marine Corps, to amend the military orders releasing them from active duty so as to authorize payment of readjustment pay pursuant to 10 U.S.C. §687(a). The district court held that the officers were entitled to readjustment pay and entered judgment in their favor. The Government appealed all three judgments. The cases were consolidated for purposes of appeal. The judgments were reversed on appeal. The servicemen then petitioned for a writ of certiorari to the Court of Appeals, Ninth Circuit and their petition was granted by this Court.

The facts in all three cases were stipulated at time of trial. Adams, Steneman and Youngquist were Marine Corps Reserve Captains serving on active duty. Each requested that his active duty service be extended, but these requests were not approved by the Commandant of the Marine Corps. The three aviators were ordered released from active duty under honorable circumstances. Each officer was to be released after continuous active service of more than four years and six months but less than five full years. The orders releasing them from active

duty specified that they were not to receive readjustment pay.[1]

Prior to the release dates specified in their orders, the three servicemen commenced actions in district court. They sought orders requiring The Secretary to modify their release orders so as to specify entitlement to readjustment pay and requiring The Secretary to pay them readjustment pay under 10 U.S.C. §687. Following trial on the stipulated facts, the district court held that the servicemen were entitled to readjustment pay based upon the fact that they had completed in excess of four years and six months of continuous active duty. Judgments were entered on October 31, 1972, ordering The Secretary to pay readjustment pay to the servicemen upon their involuntary release from active duty. The amounts ordered to be paid as stipulated between the parties were $9,273.00 for Captains Adams and Steneman and $10,065.00 for Captain Youngquist.

On November 3, 1972, the Government filed notices of appeal from these judgments and on December 1, 1972, the court of appeals stayed the judgments pending appeal. The cases were consolidated for purposes of appeal and on August 1, 1973, the court of appeals reversed, holding that five full years of continuous active duty was necessary for entitlement to readjustment pay.

The servicemen petitioned this Court for a writ of certiorari to the court of appeals and on January 7, 1974, this Court granted the petition.

---

[1] Each of the petitioners served over five full years of continuous active duty prior to his actual release, but this was accomplished only by means of injunctive relief granted by the district court barring their involuntary release without readjustment pay pending trial on the merits.

ARGUMENT

I.

THE ROUNDING PROVISION OF 10 U.S.C. §687(a) APPLIES EQUALLY TO BOTH THE ELIGIBILITY REQUIREMENTS AND TO THE METHOD OF COMPUTATION.

A. The Statute Is Clear on Its Face. The Courts May Not Resort to Statutory Construction.

The decision of the court of appeal is erroneous and should be reversed due to a fundamental error. That court found the statute to be ambiguous due to an "inconsistency" between §687(a) and §687(a)(2) in the meaning of the word "year". Having found this "inconsistency", the court then proceeded to search the legislative history of the statute for the intent. The mistake made was that the court looked at the body of §687(a) by itself. Then it isolated §687(a)(2) and read it separately. The obvious result was to find differences between those two parts of the whole—hence, an ambiguity.

Why did the court of appeals not read the statute in its entirety, as this Court has admonished,[2] in order to determine whether it contained an internal inconsistency? The statute provides in pertinent part:

> "§687(a) . . . , a member of reserve component . . . who is released from active duty involuntarily . . . who has completed, immediately before release, at least five years of continuous active duty, is entitled to a readjustment payment computed by multiplying his years of active service . . . by two months' basic pay of the grade in which he is serving at the time of his release . . . For the purposes of this subsection—

[2] See *Rice v. Minnesota & N.W.R. Co.*, 66 U.S. 358, 1 Black 358, 17L.Ed. 147 (1861).

"(1) a period of active duty is continuous if it is not interrupted by a break in service of more than 30 days;

"(2) a part of a year that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded . . ."

Even a cursory reading of subsection 687(a) reveals that it covers entitlement to, as well as computation of, readjustment pay. The introductory phrase "For the purposes of *this subsection* . . .", which connects subsections (1), (2) and (3) to the body of §687(a), most certainly refers to subsection 687(a). Thus, the prefatory phrase and (2) might just as well be read "for the purposes of entitlement to and computation of readjustment pay—(2) a part of a year that is six months or more is counted as a whole year, and a part of the year that is less than six months is disregarded . . .". To deny this interpretation is to deny the plain meaning of words. Accordingly, in determining petitioners' eligibility for readjustment pay as well as computing the amounts thereof, in each case the fraction of a year which is six months plus is counted as a whole year, bringing each up to a total of five years of active duty for the purposes of 10 U.S.C. §687.

It should be noted that §687(a)(1), which, of course, also follows the same prefatory phrase, defines the word "continuous" found in the body of §687(a). In other words, it defines the general term "continuous" in a most specific way. This is the very same function that §687(a)(2) performs in connection with the word "year". It provides a specific, statutory definition for a general term. Therefore, any consideration of the eligibility requirement of five years without consideration of the definition of "year" found within the same statute, does violence to it.

The Court in *Schmid v. United States*, 436 F.2d 987 (Ct. Cls.), cert. denied, 404 U.S. 951 (1971), the only previous holding interpreting the requirements of 10 U.S.C. §687, recognized this fact when it viewed the statute as the sum of its parts and not in a disjointed manner and stated as follows:

> "We find that the section is clear and unambiguous on its face and is susceptible on its face, of only one interpretation . . . The clear indication is that, in determining eligibility for readjustment pay and in computing the amount thereof, a period of six months or more is counted as a whole year. 436 F.2d 987, 989."

Accordingly, no ambiguity existing on the face of the statute, no reason for statutory construction is present. This Court and others have reiterated this maxim in many ways.

> "Where the language of a statute is transparent and its meaning is clear there is no room for the office of construction, since there should be no construction where there is nothing to construe." *Lewis v. U.S.*, 92 U.S. 618, 23 L.Ed. 513 (1875).
>
> "Rules of statutory construction have no place, except in the domain of ambiguity and may not be used to create, but only to remove, doubt." *Russell Motor Car Co. v. U.S.*, 43 S.Ct. 428, 261 U.S. 514, 67 L.Ed. 778; *Freygang v. U.S.*, 43 S.Ct. 428, 261 U.S. 514, 67 L.Ed. 778 (1923).
>
> "Court cannot construe statutory language so plain as to need no construction, or refer to legislative committee reports where there can be no doubt of the meaning of the words used." *Helvering v. City Bank Farmers Trust Co.*, 56 S.Ct. 70, 296 U.S. 85, 80 L.Ed. 62 (1935).
>
> "A law is the best expositor of itself". *Pennington v. Coxe*, 6 U.S. 33, 2 Cranch 33, 2 L.Ed. 199 (1804).

In *Wilbur v. U.S. ex rel. Vindicator Consolidated Gold Mining Co.*, 52 S.Ct. 113, 284 U.S. 231, 76 L.Ed. 261 (1931), this Court held that the "(H)istory of legislation may not be invoked in construing a statute, the language and meaning of which are clear." Similarly, the Court stated in *Gemsco, Inc. v. Walling*, 65 S.Ct. 605, 324 U.S. 244, 89 L.Ed. 921 (1945), that "(T)he plain words and meaning of a statute cannot be overcome by legislative history". Yet the court below did just that. It resorted to prior statutes and committee reports to create doubt in the explicit, clear and plain definition of "year" found in §687(a)(2) of the statute.

Finally, it is perhaps ironic that the Government insists that §687 was intended to be a mere revision and that Congress erred in revising the former statute. For, if this be true, the courts are not free to look to the original statute to determine whether an error has been made in revision *absent doubtful language* in the revised statute. *Victor v. Arthur*, 104 U.S. 498, 26 L.Ed. 633 (1881). As we have seen, in the instant case the language of §687(a) does not become doubtful until *after* one resorts to legislative history. Unfortunately, this fact was overlooked by the court of appeals.

B. The Legislative History of the Statute Is Ambiguous.

As previously noted, Petitioners are in complete agreement with the *Schmid* Court, the *Cass* Trial Court and the holding of the Trial Court herein, that the language of the statute is clear and the meaning unambiguous. Petitioners agree that there is no room for statutory construction.

However, the court of appeals, after finding ambiguity, reversed on the basis of a legislative intent which it purported to find by means of a tool of statutory

construction—namely, the legislative history of the statute. Assuming arguendo an ambiguity exists in the language of the statute, in this instance legislative history is of no help whatsoever in attempting to ascertain legislative intent. The history of this statute simply does not support the Respondent's assertions that the rounding provision applies *clearly* only to the quantum of readjustment pay and not to eligibility therefor.

1. *The Statute Is Not Clearly a Result of a Mere Codification of Earlier Law and Nothing More.*

Respondent's contention that in its present form, 10 U.S.C. §687(a) is a mere codification of earlier law and should be so interpreted "begs the question". This statute, passed as Public Law 87-651 on September 7, 1962, was the result of H.R. 10433. H.R. 10433 was made up of three separate bills. They were incorporated as Titles I, II and III to the bill. The proposals as to §687 appeared in Title I. The bill was described as a bill "to amend Title 10, United States Code, to codify recent military laws and to improve the code, . . ."[3]

Thus, it is certainly arguable that Title I of the bill was concerned with the first stated purpose—to amend Title 10; that Title II of the bill was the part which codified recent military laws and Title III of the bill contained general improvements in the Code. An examination of the revision notes to the bill reveals that this matching by Titles and purposes works. This interpretation is buttressed by Mr. Libonati's reference to H.R. 10433 as three bills.[4]

In addition, the appendix to the revision notes containing the text of §687 as revised refers to said text

[3]U.S. Code Cong. & Adm. News p. 2456 and Congressional Record - House; 1962, p. 4435.

[4]Congressional Record-House, 1962, p. 4441.

as *new matter* and, according to custom, presents it in italics presumably to distinguish it from old matter.[5] Such treatment is not indicative of a mere change in the form of old matter.

There is further proof that at least some of the draftees intended substantial changes in the law concerning readjustment pay in 1962 and, at the same time, there is evidence that the legislators were confused about the law. Such confusion was not eliminated with the passage of P.L. 87-651.

In the *Revision Notes* to H.R. Report 1401 (87th Cong., 2d Session, 1962), the Judiciary Committee stated that the words "lump sum" and "(F)or the purposes of" are omitted from (new bill) as *surplusage*.[6] The words "lump sum" which appeared in the body of the existing statute, 50 U.S.C. 1016, were, in fact, deleted from the new act. However, we know that the wording "(F)or the purposes of" was not abandoned. The wording found in the body of 50 U.S.C. 1016, "(F)or the purposes of computing the amount of readjustment payment", was simply relocated at the end of §687(a) and modified to "For the purposes of this subsection—". Several questions remain unanswered. Exactly what words were considered surplusage by the House Committee and were to be omitted? Why was the Senate silent on the subject? Why did the words reappear in the act if they were to be omitted? Why were the exact words "(F)or the purposes of this subsection—" chosen? Petitioners respectfully submit that we cannot know the answers from this vantage point. The legislative history is ambiguous. It can be used to support several hypotheses. It certainly does not support the Respondent's theory that the key words found in 50 U.S.C. 1016 were omitted unintentionally, to the exclusion of all other possibilities.

[5] H.R. Rpt. 1401, 87th Congress, 2nd Session, p. A-20.

[6] H.R. Rpt. 1401, 87th Congress, 2nd Session, p. A-1.

To illustrate this point, petitioners offer the following as a logical hypothesis for the present form of the statute. H.R. 10433 incorporated the definition of "continuous active duty" from the body of 50 U.S.C. 1016 and placed it in sub-section (1) of §687(a), but the new bill did not omit any of the former words as surplusage.

The new bill also adopted the definition of the word "year" found in the body of 50 U.S.C. 1016 and placed it in sub-section (2) of §687(a). But Congress specifically omitted the qualifying, limiting phrase which preceded that definition in the earlier statute–(i.e., "(F)or the purposes of computing the amount of readjustment payment.") The only clue we are given is that the House Judiciary Committee states that it did so because the phrase was surplusage.

Why was it surplusage? In reading 50 U.S.C. 1016(a), it is apparent that the drafters of the new bill understood the word "amount" in the subject phrase to include any sum between $0.00 and $15,000.00–that is, eligibility for any amount as well as computation of a specific amount of readjustment pay. How and why did they reach this conclusion? 50 U.S.C. 1016(a) also read in pertinent part:

> "For the purposes of computing the amount of readjustment payment; . . .; any prior period for which readjustment pay has been received under any other provision of law shall be excluded."

Did the drafters of 50 U.S.C. 1016(a) intend only that prior years of service for which severance or readjustment pay had been received under prior or parallel statutes could not now be counted by a serviceman in computing the quantum of readjustment pay due him under 50 U.S.C. 1016(a) should he re-enlist and begin a new period of active duty or did they mean to ensure that a former serviceman who had received payment under a different statute could not now reapply for a second payment on

the basis of his original active service under the newly passed statute. The answer must be the latter was intended, otherwise, a pandora's box of valid claims would be opened—not to be closed until a much later date by the effect of the applicable statute of limitations.

In other words, the "prior period" exclusion found in 50 U.S.C. §1016(a) referred to eligibility for, as well as computation of, the amount of readjustment pay and this was understood by the framers of the new bill H.R. 10433. They saw that both the "six month or more" definition of a year and the "prior period" exclusion applied to entitlement as well as computation of amount and they acted accordingly. They adopted both provisions and set them out in the new legislation as (2) and (3) of §687(a) *after* dropping the surplus introductory phrase and replacing it with an unambiguous one.

Can it be argued in good conscience that §687(a)(3) which reads "For the purposes of this subsection— . . . (3) a period for which the member concerned has received readjustment pay under another provision of law may not be included." applies only to computation of the amount of pay and not to eligibility for readjustment pay as well? Can it be said that the 87th Congress intended that a serviceman who received readjustment pay under 50 U.S.C. 1016 could now claim eligibility for a second readjustment payment under Title 10 on the basis of the same active service? Hardly, but that tortured result is a logical extension of the Government's interpretation of the definition of the word "year" which had the very same introductory phrase in 50 U.S.C. 1016(a) and has the same one in §687(a). The legislative treatment and history of §687(a)(2) and §687(a)(3) have been identical. How can their interpretation differ?

2. *There Is Prior Statutory Precedent To Support the "Plain Meaning" Interpretation of §687 Offered by Petitioners.*

The Government has noted that several other statutes containing "rounding provisions" differ markedly in form from 10 U.S.C. §687, and, by analogy, argue that the rather circuitous method used by Congress herein indicates clearly a revision error and nothing more. The Government does recognize one major exception, 10 U.S.C. §6330, which deals with the retainer pay of enlisted members upon their transfer to the Fleet Reserve or Fleet Marine Corps Reserve. Petitioners submit that it is a most important exception for it is undeniable precedent that a *determination of eligibility* can be set out in a subsequent subsection, containing a definition of the word "year", which is used earlier in the body of the statute. Subsection (b) of 10 U.S.C. §6330 sets up a minimum of 20 *years* of active service for *eligibility* for retainer pay. Subsection (c) deals with the *computation* of retainer pay. Then, in subsection (d), language which is almost identical to that found in §687(a)(2) is used.

> "(d) For the purposes of subsections (b) and (c), a part of a year that is less than six months or more is less than six months is disregarded. . . ." (10 U.S.C. §6330(d))

10 U.S.C. §6330 was adopted in its above form as part of Public Law 85-583 on August 1, 1958, barely four years prior to the enactment of 10 U.S.C. §687. It is not reasonable to assume that in copying the very form of §6330, the drafters of §687(a)(1), (2) and (3) were consciously adopting a form and style which they found were recently utilized in Title 10, U.S.C. Is it not reasonable to conclude that they purposely used a subsection to define the period of eligibility (years), just as the 85th Congress had done in a similar military pay statute?

3. *Where Legislative History Is Ambiguous, the Courts Will Look to the Statute for Legislature Intent.*

Petitioners submit that in view of the foregoing, legislative history is most inconclusive and permits a variety of reasonable hypotheses concerning the present form of §687(a). This being the case, the court below erred in not returning to the statute itself in the judicial search for legislative intent. See *Citizens To Preserve Overton Park, Inc.*, 91 S.Ct. 814, 401 U.S. 402, 28 L.Ed. 136, on remand 335 F. Supp. 873 (1971). In failing to do so, the court of appeals allowed contradictory, ambiguous legislative materials to control the customary meaning of words. See *N.L.R.B. v. Plasterer's Local Union No. 79*, 92 S.Ct. 360, 404 U.S. 116, 30 L.Ed.2d 312 (1971).

Had the court returned to the statute itself, it could have resolved the apparent, internal inconsistency which it had found earlier, by resorting to a simple, well-defined tool of statutory construction. Specific provisions of a statute govern and supercede general provisions included in the same statute. *Adams v. Woods*, 6 U.S. 336, 2 Cranch 336, 2 L.Ed. 297 (1805); *Baltimore Nat. Bank v. State Tax Commission of Maryland*, 56 S.Ct. 417, 297 U.S. 209, 80 L.Ed. 586 (1936). The rule remains viable even though the general provisions, if standing, alone, would include the same subject. *Karrell v. U.S.*, 181 F.2d 981, 9th Circuit, 1950, cert. den. 340 U.S. 891, 71 S.Ct. 206, 95 L.Ed. 646 (1950); *Monte Vista Lodge v. Guardian Life Insurance Co. of America*, 384 F.2d 126 (9th Circuit 1967), cert. den. 88 S.Ct. 1041, 390 U.S. 950, 19 L.Ed. 1142.

Accordingly, the body of §687(a) deals with both entitlement to and computation of readjustment pay. It uses the word year in relation to both subjects without

defining that term. Next, there appears the introductory and limiting phrase "(F)or the purposes of this subsection—", which is followed by subsection (2) containing a specific definition of the word "year". Petitioners concede that if (2) were not part of the statute and the general provision stood alone, for the purposes of subsection §687(a), a year would have to be defined as a twelve month, calendar year—for both entitlement and computation. It does not stand alone, however. The introductory phrase found in subsection 687(a) appearing just before the text of subsections (1), (2) and (3), indicates to the reader that what is to follow will explain subsection 687(a) in certain specific areas. Then, the application of the familiar rule of construction that a specific provision governs a general provision, dissolves any apparent inconsistency. For the purposes of subsection 687(a), which undeniably deals with entitlement to as well as computation of readjustment pay, a year is defined as "a part of a year that is six months or more. . . ."

4. *In Light of the Legislative History of the Statute, Administrative Interpretation Is Entitled to No Weight.*

The Respondent offers the fact that all branches of the armed services have interpreted §687(a) as requiring a full five years of service for entitlement purposes and argues that such interpretation be afforded great weight by the courts. Petitioners agree that long and continuous uniform administration is normally deserving of some consideration. In the instant case, however, neither factor is present.

First, consistency or uniformity is illusory. With the exception of the Coast Guard, all of the armed services are under the aegis of the Department of Defense. In actuality, the Department of Defense Pay and Allowances

Entitlement Manual §40411 and 40414 construed the statute and all of the services adopted the same construction in their regulations. One must wonder aloud if they were free to act differently.[7]

Secondly, less than nine years elapsed from the passage of the statute in question until the *Schmid* decision by the Court of Claims in January of 1971. An administrative interpretation by essentially one governmental agency which was deemed faulty by the first court called upon to decide the issue is not deserving of "time-honored" stature.

CONCLUSION

Petitioners respectfully submit that the statutory language is clear, that no ambiguity exists in the language, form or style of the statute, and that they are entitled to readjustment pay on the basis of four years and six

---

[7]In fact, two of the regulations, Sec. Nav. Instr. 1900.7B and Mar. Cor. Ord. 1900.1H(7), refer to the DOD Pay and Entitlements Manual by name.

months of continuous active service. Petitioners also submit, that if legislative history is searched for a legislative intent, a case can be made for several intentions and that the legislative history falls far short of providing as Respondent argues, a clear view of the intent of Congress so as to negate the plain meaning of the words:

> "(F)or the purposes of this subsection–
> "(1) . . .
> "(2) A part of a year that is six months or more is counted as a whole year, ..." (10 U.S.C. §687(a).

Respectfully submitted,

WILLIAM A. DOUGHERTY
PAUL R. CONSTANTINO
17291 Irvine Boulevard
Tustin, California 92680
Telephone: (714) 838-7222
Counsel for Petitioners